1987

State of Utah v. Kenneth Eugene Wynia : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DOCKET NO. 870113-CA

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 870113-CA
v.	:	
KENNETH EUGENE WYNIA,	:	Category No. 2
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

JURISDICTION AND NATURE OF PROCEEDING

This appeal is from a conviction of four drug offenses, second and third degree felonies, after a jury trial in the Third Judicial District Court. This Court has jurisdiction to hear the appeal under UTAH CODE ANN. § 78-2a-3(2)(e)(1987).

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Was defendant denied a fair trial due to ineffective assistance of counsel?

2. Is the defendant entitled to reversals of his convictions on the basis of entrapment?

3. Did the trial court err in admitting exhibits into evidence over defendant's objection that there was a defect in chain of custody?

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Utah Constitution, Article I

Sec. 12 [Rights of accused persons.]

> In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, ...

United States Constitution

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of counsel for his defense.

AMENDMENT XIV

Section 1.

[N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

Utah Code Annotated, 1953 as amended:

58-37-8. Prohibited acts--Penalties.

(1) Prohibited acts A--Penalties.

(a) Except as authorized by this chapter, it is unlawful for any person knowingly and intentionally:

. . . .

(ii) to distribute for value or possess with intent to distribute for value a controlled or . . . substance;

. . . .

(iv) to agree, consent, offer, or arrange to distribute or dispense a controlled substance for value . . . .

(b) Any person who violates Subsection (1)(a) with respect to:

(i) a substance classified in Schedules [Schedule] I or II is, upon conviction, guilty of a second degree felony, ...

(ii) a substance classified in Schedules III and [or] IV, or marijuana is, upon conviction, guilty of a third degree felony, ...

76-2-303. Entrapment.

(1) It is a defense that the actor was entrapped into committing the offense. Entrapment occurs when a law enforcement officer or a person directed by or acting in co-operation with the officer induces the commission of an offense in order to obtain evidence of the commission for prosecution by methods creating a substantial risk that the offense would be committed by one not otherwise ready to commit it. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

. . . .

(4) Upon written motion of the defendant, the court shall hear evidence on the issue and shall determine as a matter of fact and law whether the defendant was entrapped to commit the offense. Defendant's motion shall be made at least ten days before trial except the court for good cause shown may permit a later filing.

(5) Should the court determine that the defendant was entrapped, it shall dismiss the case with prejudice, but if the court determines the defendant was not entrapped, such issue may be presented by the defendant to the jury at trial. Any order by the court dismissing a case based on entrapment shall be appealable by the state.

. . . .

77-14-6. Entrapment--Notice of claim required.

Notice of claim of entrapment shall be given by the defendant in accord with § 76-2-303.

STATEMENT OF THE CASE

Defendant, Kenneth Eugene Wynia, was charged by information with four counts of distribution for value, offering, agreeing or arranging to distribute for value, or possession with intent to distribute for value, a controlled substance, two second degree felonies (cocaine) and two third degree felonies (marijuana), in violation of Utah Code Ann. § 58-37-8 (Supp.

1985) (amended 1986, 1987).[1] Prior to trial, defendant, through trial counsel, gave notice of intent to claim the defense of entrapment (R. 10). On the day of trial a jury was impaneled, but prior to evidence being presented to the jury, a hearing was held before the trial court on defendant's claim of entrapment. Defendant's counsel called and examined the State's primary witnesses, undercover police officers Celeste Paquette and Patricia Pusey, concerning their dealings with the defendant, after which counsel submitted the entrapment issue to the trial court, at which time the court denied defendant's motion (Tr. 38-58). After a jury trial, defendant was found guilty as charged on all four counts (R. 45-48). The court sentenced the defendant to the Utah State Prison for terms of zero to five years on the marijuana counts and terms of one to fifteen years on the cocaine counts, ordering that the cocaine counts run consecutively to each other and that the marijuana counts run concurrently with the cocaine counts. The court further ordered restitution to the State of Utah and Metropolitan Strike Force in the amount of $250.00 (R. 50).

STATEMENT OF FACTS

Respondent accepts the statement of facts set out in appellant's brief (App. Br. 1-5) as being an adequate general recitation of facts, subject to the clarifications and additions set out below in argument relative to each point.

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[1] The statute in effect at the time of the offenses, including the 1985 amendments, is reproduced in Addendum 2 of appellant's brief. It has since been amended again in 1986 and 1987.

SUMMARY OF ARGUMENT

Defendant received effective assistance of counsel. Further, defendant has failed to establish that he was denied effective assistance of counsel. Specifically, he has failed to satisfy his burden of showing either (1) that he suffered unfair prejudice as a result of his counsel's performance, or (2) that his lawyer did not in fact render reasonably effective assistance of counsel. The alleged deficiencies in counsel's performance are explainable on the basis of trial tactics and professional judgment, and did not prejudice his case.

Under the statute and Utah Supreme Court decisions relevant to entrapment, defendant is not entitled to reversals of his convictions on a theory of entrapment. He has not shown that the tactics used by the police fell below standards of acceptable police conduct, or that those tactics created a substantial risk that the offenses would be committed by one not otherwise ready to commit them. The police conduct merely afforded the defendant the opportunity to commit the offenses.

The trial court did not abuse its discretion in admitting the drug exhibits into evidence over defendant's objection. The State laid sufficient foundation to establish that the exhibits were in fact the drugs purchased by the undercover officers and that in all reasonable probability the proffered evidence had not been changed or altered. Under relevant decisions by the Utah Supreme Court concerning chain of custody, the evidence was properly admitted and any claimed defect under the facts of the instant case would go to weight and not to admissibility.

ARGUMENT

POINT I

DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends that he was denied a fair trial because his trial counsel was ineffective. Specifically, he claims four errors to demonstrate defense counsel's alleged deficient performance: (1) counsel never questioned the discrepancies in the testimony of the State's chief witnesses, (2) counsel did not highlight for the jury the acts of the undercover officers which, defendant asserts, constituted entrapment, (3) counsel did not argue the applicable law and facts before submitting the entrapment issue to the court in a pre-trial entrapment hearing, (4) counsel failed to point out to the jury an alleged weakness in the chain of custody once the court had admitted the challenged exhibits into evidence. Based upon counsel's alleged ineffectiveness, defendant requests a new trial.

The governing legal standards applicable to a claim of ineffective assistance were summarized by the Utah Supreme Court in Codianna v. Morris, 660 P.2d 1101 (Utah 1983):

> Relying on Dyer v. Crisp, [613 F.2d 278 (9th Cir. 1980)], and other authorities, our recent opinion in State v. Malmrose, Utah, 649 P.2d 56, 58 (1982), identifies the following considerations necessary to determine whether a conviction should be reversed or set aside on the basis of ineffective assistance of counsel: (1) The burden of establishing inadequate representation is on the defendant, and "proof of such must be a demonstrable reality and not a speculative matter." State v. McNicol, 554 P.2d at 204. (2) A lawyer's

> "legitimate exercise of judgment" in the choice of trial strategy or tactics does not constitute ineffective assistance of counsel. State v. McNicol, 554 P.2d at 205. (3) It must appear that any deficiency in the performance of counsel was prejudicial. State v. Forsyth, Utah, 560 P.2d 337, 339 (1977); Jaramillo v. Turner, 24 Utah 2d 19, 22, 465 P.2d 343, 345 (1970). In this context, prejudice means that without counsel's error there was a "reasonable likelihood that there would have been a different result. . . ." State v. Gray, 601 P.2d at 920. Similarly, as we stated in State v. Malmrose, 649 P.2d at 58, "the failure of counsel to make motions or raise objections which would be futile if raised does not constitute ineffective assistance."

660 P.2d at 1109.

The standards enunciated by the Utah Supreme Court parallel the standards set forth by the United States Supreme Court in the case of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). In Strickland, the first case decided by the United States Supreme Court which specifically addressed actual ineffectiveness of counsel, the Court fashioned a two component test:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

104 S. Ct. at 2064.

While the Codianna and Strickland standards are worded differently, their tests are fundamentally similar. Both cases put the burden of proof on a defendant to prove two points. First, a defendant must prove that his counsel's performance was actually deficient (or inadequate); and, second, he must prove that the deficient performance prejudiced the outcome of his trial.

If a defendant fails to prove that defense counsel's performance was actually deficient, the conviction must stand. Also, if a defendant fails to prove that the outcome was prejudiced by defense counsel's performance, the reviewing court should not overturn the conviction. Hence, if there is no proof that prejudice occurred, the reviewing court need not examine whether defense counsel's performance was actually deficient. The Strickland Court specifically addressed the possibility of deciding appeals solely on the prejudice component:

> Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffectiveness claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

104 S. Ct. at 1069-70.

The Strickland Court has accurately stated several reasons why state courts may first examine the prejudice component in certain cases. Because a defendant must prove both components of the test (deficient performance and prejudice), the failure to prove one prohibits reversal of the conviction. Also valid is the Court's statement that first examining the prejudice component will help the criminal justice system by avoiding the negative effects of grading defense counsel's performance. Perhaps most important is the Court's practical statement that first examining the prejudice component will simply be easier for the reviewing court in many instances. Of course, in those cases where it is difficult to determine whether prejudice resulted, the reviewing court would necessarily, and properly, spend significant time deciding whether defense counsel's performance was deficient. However, in those cases where counsel's performance clearly had not prejudiced the result, the reviewing court could avoid the difficult and time-consuming process involved in examining the sometimes multiplicitious allegations of deficient performance.

Based upon the foregoing, this Court should reject defendant's ineffective assistance claim for lack of prejudice. Clearly, the alleged errors of defense counsel, even if true, are not sufficient to have prejudiced the outcome of his trial. Alternatively, counsel's performance was not deficient under applicable legal standards.

A. DEFENDANT HAS FAILED TO PROVE THAT DEFENSE COUNSEL'S PERFORMANCE PREJUDICED THE OUTCOME.

In Codianna, the Utah Supreme Court defined prejudice in ineffectiveness cases to mean a defendant must show that without counsel's error there was a "reasonable likelihood that there would have been a different result. . . ." 660 P.2d at 1109; citing State v. Gray, 601 P.2d 918 (Utah 1979). The standard enunciated by the United States Supreme Court in Strickland is very similar:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

104 S. Ct. at 2068.

Defendant first asserts that defense counsel never questioned the State's primary witnesses and undercover officers, Celleste Paquette and Patricia Pusey, regarding the discrepancy as to when the defendant allegedly gave cocaine to Pusey on January 3. In citing to the record in his brief, defendant fails to point out that the discrepancy in testimony was brought out not only by the prosecutor on direct examination of Paquette (Tr. 88) and Pusey (Tr. 132), but also highlighted by his counsel on cross-examination of Paquette (Tr. 101) and Pusey (Tr. 142-43). Having made the most of such discrepancy without giving the witnesses the direct opportunity to explain it or to modify their testimony, counsel was in a position to argue and did in fact argue the discrepancy to the jury during his closing argument

(Tr. 188-89). It is difficult to see what could have been accomplished by questioning the witnesses further on the subject.

As a sub-point, defendant says that his counsel did not note the discrepancy between the officers' testimony as to who first initiated the discussion regarding cocaine on January 10. Specifically, defendant states that while Pusey said she initiated that conversation (Tr. 146), Paquette testified that the defendant did (Tr. 90). On cross-examination by defense counsel, however, Paquette admitted that it could have possibly been Pusey who first requested cocaine from the defendant (Tr. 105). Defense counsel therefore adequately handled the prior discrepancy through Paquette's concession on cross-examination, and thereafter argued to the jury in closing that all conversations concerning drugs were initiated by the officers rather than by defendant (Tr. 190).

As to defendant's argument that where entrapment is raised as a defense, the discrepancy in testimony is particularly important, the argument is not well taken in the instant case. The only real discrepancy in testimony concerns the exact location of the cocaine transfer between the defendant and Pusey on January 3, 1986. While it may always be helpful in undermining credibility generally to discover and emphasize any discrepancy in testimony, as defendant's trial counsel did in his closing argument, the discrepancy here is not particularly germaine to the entrapment issue, which focuses on the propriety of the officers' conduct, as will be more fully discussed under Point II. The propriety of the officers' conduct does not hinge

on whether defendant passed the bundle of cocaine to Pusey in the parking lot or after they got into the car. The issue of who initiated conversation concerning drugs, on the other hand, would be germaine to the entrapment issue, but, as mentioned above, defense counsel adequately handled Paquette's direct testimony that defendant initiated the conversation concerning cocaine by obtaining a concession from her on cross-examination that it could have been Pusey who first requested the cocaine.

Defendant next contends that his counsel did not highlight to the jury in closing argument the acts of the officers which he claims constituted entrapment. His counsel did argue that the defendant was entrapped, read to the jury the instruction concerning the defense of entrapment, and focused on his main point, namely, that it was not the defendant but the officers who initiated all conversations concerning drugs (Tr. 190-91). The fact is that the defendant had a very meager case on entrapment, as will be more fully analyzed under Point II. There was little which his counsel could argue in good faith based on the evidence adduced at trial.

Defendant's next point concerns the pre-trial entrapment hearing in which, following his taking testimony from Paquette and Pusey, defense counsel did not argue the applicable law and facts before submitting the entrapment issue to the court. In determining potential prejudice in this regard, it is first noteworthy that counsel did preserve the entrapment issue for trial in two particulars. First, he filed a written motion and gave notice of his intent to rely on the defense of

entrapment and did so at least 10 days prior to trial as required by Utah Code Ann. § 76-2-303(4), which provides:

> (4) Upon written motion of the defendant, the court shall hear evidence on the issue and determine as a matter of fact and law whether the defendant was entrapped to commit the offense. Defendant's motion shall be made at least ten days before trial except the court for good cause shown may permit a later filing.

A perusal of the court file shows that defense counsel's Motion for Defendant to Claim Entrapment as a Defense and Notice was dated August 5, 1986, and stamped "filed" by the Tooele County Clerk's office on August 7, 1986 (Tr. 10). The court's minute entry of July 14, 1986 (R. 9) shows that the trial was scheduled for August 28, 1986, which was in fact the date the trial began. Thus there is no question that counsel complied with the 10-day notice requirement of Utah Code Ann. § 76-2-303(4) which is mandated by Utah Code Ann. § 77-14-6, which states: "Notice of a claim of entrapment shall be given by the defendant in accord with § 76-2-303."

Secondly, a hearing was held before the court on the motion prior to the taking of evidence at his jury trial on August 28, 1986 (Tr. 38-58). At that hearing, defense counsel called both undercover officers as witnesses and elicited information which might bear on the issue of entrapment. After the court denied his motion, defense counsel stated that the main reason he brought the entrapment motion was so that he could raise the issue before the jury (Tr. 58). This demonstrates counsel's knowledge of the entrapment section of the criminal code which provides in § 76-2-303(5), in pertinent part: ". . .

but if the court determines the defendant was not entrapped, such issue may be presented by the defendant to the jury at trial . . . ."

It is thus clear from the record that defense counsel did a competent job in preserving the entrapment issue for trial by giving proper notice and conducting a hearing before the court on the entrapment issue.

The fact that defense counsel submitted the issue of entrapment to the court without argument did not result in prejudice to his case. As will be discussed under Point II, the facts of this case simply do not suggest a viable entrapment defense based upon the applicable law. Counsel was not constrained to go through the motions of arguing a futile motion before the court where defendant was clearly not entrapped as a matter of law. See State v. Malmrose, 649 P.2d 56, 58 (Utah 1982), cited in Codianna v. Morris, supra. Even were his case a better one for entrapment, defense counsel's submitting the issue to the court without argument after the two witnesses testified would not likely have affected the outcome of the motion absent an indication from the court that it desired clarification of the law of entrapment before rendering a decision. The issues were not complicated or complex, nor was the testimony of the two witnesses lengthy (Tr. 39-58).

Defendant's next argument is that his counsel erred in not pointing out to the jury the weakness in the chain of custody of the drugs after the court admitted the evidence. As will be discussed under Point III, below, the chain of custody was

adequately established, and there was no indication that any of the exhibits had been tampered with or altered in any way. Still, defense counsel did attempt to keep out the proffered evidence by objecting to its admission before the jury on the basis of an alleged defect in chain of custody (Tr. 85-86, 164-65, 176). Contrary to defendant's assertion that it was defense counsel's "duty to point out the weakness in the evidence to the jury" (App. Br. 8), it could equally be argued that his decision not to do so was based on a legitimate exercise of judgment in order to maintain credibility with the jury in arguing his other points.

> A lawyer's "legitimate exercise of judgment "in the choice of trial strategy or tactics that did not produce the anticipated result does not constitute ineffective assistance of counsel.

Codianna, 660 P.2d at 1109 citing State v. McNicol, 554 P.2d 203, 205 (Utah 1976).

Based upon the foregoing, it is clear that defendant's claim of prejudice is speculative at best, and that he has failed to satisfy his burden of showing that he suffered unfair prejudice as a result of any one or more of the alleged deficiencies.

B. DEFENDANT HAS FAILED TO PROVE DEFENSE COUNSEL'S PERFORMANCE WAS ACTUALLY INEFFECTIVE.

While the Court can decide this appeal solely on lack of prejudice, defendant has also failed to prove that defense counsel's representation was deficient. The Utah Supreme Court in Codianna stated that proof of inadequate representation "must be a demonstrable reality and not a speculative matter." 660

P.2d at 1109; citing State v. McNicol, 554 P.2d at 204. The United States Supreme Court in Strickland stated that the proper standard for judging attorney performance is "reasonably effective assistance." 104 S. Ct. at 2064; see also Codianna, 660 P.2d at 1109. The Strickland Court declined to create more specific guidelines, believing the broader standard of reasonableness, when considered with all the circumstances of a particular case, was more appropriate. Id. at 2065. However, the Strickland court specifically stated the reviewing courts should be highly deferential to defense counsel:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. (Citation omitted.) A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

104 S. Ct. at 1065-66.

As pointed out above, defense counsel provided defendant with constitutionally sufficient assistance of counsel. All alleged deficiencies have been discussed above and are explainable on the basis of trial tactics and professional judgment.

In his opening statement to the jury, defense counsel vowed to represent his client zealously within the bounds of the law and to the best of his ability (Tr. 71). While appellate counsel may, in retrospect, find things in the record that might have been done differently, that record reflects that the defendant received "the skill, judgment and diligence of a reasonably competent defense attorney." Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir. 1980) (en banc).

For the foregoing reasons, defendant has not met his burden of proof in showing that defense counsel failed to render reasonably effective assistance as required by the federal and Utah Constitutions.

POINT II

DEFENDANT IS NOT ENTITLED TO HAVE HIS CONVICTIONS REVERSED ON THE BASIS OF ENTRAPMENT.

Defendant argues that he is entitled to reversals of his convictions because the undercover officers entrapped him. After a brief discussion of the law of entrapment in Utah, the entrapment claim will be addressed as it relates to the facts of the case.

A. The Applicable Law

UTAH CODE ANN. § 76-2-303(1) (1978) states:

> It is a defense that the actor was entrapped into committing the offense. Entrapment occurs when a law enforcement officer or a person directed by or acting in co-operation with the officer induces the commission of an offense in order to obtain evidence of the commission for prosecution by methods creating a substantial risk that the offense would be committed by one not otherwise ready to commit it. Conduct merely

> affording a person an opportunity to commit an offense does not constitute entrapment.

This section is patterned after Model Penal Code § 2.13(1), which sets forth a purely objective test of entrapment. See State v. Taylor, 599 P.2d 496, 502-03 (Utah 1979); Perkins and Boyce, Criminal Law 1171 (3d ed. 1982). In Taylor, the Utah Supreme Court provided a clear definition of the objective test:

> Under the objective view of entrapment, the focus is not on the propensities and predisposition of the specific defendant, but on whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power. This concept establishes entrapment on its historical basis, the refusal to countenance a perversion of justice by government misconduct. The objective view provides a solid definitive standard upon which the defense can rest, i.e., does the conduct of the government comport with a fair and honorable administration of justice?

599 P.2d at 500. The objective test focuses entirely on the conduct of the police and their helpers; matters such as the defendant's character, his predisposition to commit the offense, and his subjective intent are irrelevant. Id. at 503; State v. Erickson, 722 P.2d 756, 758 (Utah 1986); State v. Cripps, 692 P.2d 747, 750 n. 3 (Utah 1984); People v. Barraza, 153 Cal. Rptr. 459, 468, 591 P.2d 947, 956 (1979); Perkins and Boyce, supra at

1171.[2]

Notwithstanding the clear definition of the objective test provided in Taylor, the Supreme Court, in some of its recent entrapment cases, has not always been particularly careful in applying the objective test, seemingly reincorporating the "predisposition" element of the subjective test. For example, in State v. Sprague, 680 P.2d 404 (Utah 1984), the Court stated:

> [W]e concluded that the offense was induced by the persistent requests by [the undercover agent], not by the initiative and desire of defendant.

680 P.2d at 406 (emphasis added). In State v. Cripps, the Court at one point concluded:

> Therefore, only police conduct that "entraps" those ready and willing to commit the crime is acceptable.

692 P.2d at 750. These statements, which do not appear to be consistent with either the language of § 76-2-303(1) or the interpretation of that statute in Taylor, are at best confusing. Presumably, they are not intended to modify Taylor in such a way as to create a hybrid objective/subjective test. See Cripps, 692 P.2d at 750 n. 3. Cf. Taylor, 599 P.2d at 504 (Hall, J.,

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[2] The subjective test of entrapment focuses primarily on the defendant's predisposition to commit the offense. Taylor, 599 P.2d at 501. Under this test, the defense of entrapment is denied to defendants who had a preexisting criminal intent, no matter how overreaching the law enforcement activity may have been. State v. Pacheco, 13 Utah 2d 148, 151, 369 P.2d 494, 496 (1962); People v. McIntire, 153 Cal. Rptr. 237, 239, 591 P.2d 527, 529 (1979).

concurring in result).[3]

Therefore, it is important for this Court to avoid the problems experienced by the Supreme Court in this area and to apply the objective test in strict accordance with Utah's entrapment statute. Two Supreme Court cases -- State v. Martin, 713 P.2d 60 (Utah 1986), and State v. Erickson, 722 P.2d at 758-59 -- are excellent examples of the objective test properly defined and applied, as is a recent case from the Utah Court of Appeals, State v. Wright, 65 Ut. Adv. Rep. 25 (1987).

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[3] A recent entrapment decision, State v. Kaufman, 52 Utah Adv. Rep. 30, 734 P.2d 465 (1987), where the Supreme Court appears to have again strayed from a true application of the objective test, drew the following criticism from one legal commentator:

> This case is another decision where the Supreme Court speaks in terms of the objective standard of entrapment but actually applies a subjective standard. Whether the offenses were committed because of inducement of the undercover officer is not the standard. The standard is whether the conduct of the officer was such that it would induce a person to commit an offense they otherwise would not commit. The opinion simply does not focus on what conduct the officer engaged in that was inappropriate. The trial court's remarks appear to be no more than sexist gratuities and offer little guidance as to what conduct is proper and what is not. It is apparent from the decisions of the Utah Supreme Court that it is never going to deal with the objective standard of entrapment in the way that concept was intended to be applied. The better approach would be for the Legislature to repeal the entrapment statute and start over with a sounder statement of when a defendant should be able to claim such a defense.

Boyce, "Supreme Court Summaries," Intermountain Commercial Record, Feb. 27, 1987, at 36, col. 2.

B. Defendant's Entrapment Claim

Defendant contends that he was entrapped because the undercover officers were female, because they met the defendant in a social setting, may have bought him drinks, had no prior reason to suspect him of drug dealing, and because the otficers initiated the conversation about drugs.

In evaluating defendant's entrapment claim, the following language from State v. Taylor is instructive:

> Extreme pleas of desperate illness or appeals based primarily on sympathy, pity, or close personal friendship, or offers of inordinate sums of money are examples, depending on an evaluation of the circumstances in each case, of what might constitute prohibited police conduct. In evaluating the course of conduct between the government representative and the defendant, the transactions leading up to the offense, the interaction between the agent and the defendant, and the response to the inducements of the agent, are all to be considered in judging what the effect of the governmental agent's conduct would be on a normal person.

Taylor, 599 P.2d at 503.

An examination of the officers' conduct as to each date defendant sold or arranged for the sale of drugs reveals no improper conduct on their part, no extreme pleas, no exploitation of any close personal friendship, no high-pressure tactics, and no unfair exploitation of the fact that they were females making contact with the defendant in a social setting. It is helpful to examine the officers' conduct separately as to each date.

1. January 3, 1986 Transactions

Detective Paquette testified that she and Pusey went to the Bowling Alley Lounge about 9:00 p.m. Paquette had a

conversation with another individual named Tony. They discussed partying and drugs, and when Paquette said she was interested in some good "smoke," meaning marijuana, Tony told her he could get some marijuana at the drop of a hat (Tr. 40-41). Tony thereafter brought defendant over to her and introduced defendant as his connection at which time defendant and Tony negotiated to sell Paquette 1/4 ounce of marijuana for $30.00 (Tr. 41). Paquette further testified that this was an average price (Tr. 49). She also testified that she did not represent herself to be a drug addict (Tr. 52), that she and Pusey dressed casually in levis and a blouse so that they wouldn't stand out (Tr. 50), and that they had a cover story to cut off any advances that might have been made (Tr. 51). Paquette further testified that she only had to ask for marijuana one time (Tr. 52).

As to the cocaine transaction of January 3, 1986, detective Pusey testified that she only made one request of the defendant (Tr. 56, 136), and that unbeknownst to Pusey, Paquette had set up a separate purchase of marijuana from defendant (Tr. 56). Pusey further testified that she paid $40.00 for a 1/4 gram of cocaine which was "a little bit high," but that it was supposed to be good quality and that defendant was the one who set the price (Tr. 140-41). Finally, Pusey testified that she offered no favors or anything other than the purchase price for the drugs (Tr. 141). The record reflects no more than casual social contacts between defendant and the officers.

2. January 10, 1986 Transaction

Detective Pusey testified that she and Paquette saw defendant at the Sandbagger Lounge, that she asked him if he could get her some "cola," or cocaine, that he arranged an introduction to another man named Matt, and that Matt sold her 1/4 gram of cocaine for $35.00 (Tr. 137-38).

Detective Paquette testified that during the conversation in which defendant discussed cocaine with Pusey, he also had a conversation with Paquette concerning marijuana (Tr. 90). Paquette testified that after she witnessed the cocaine transaction, defendant told her that they could go pick up the marijuana (Tr. 92), after which she drove at defendant's direction to a trailer court where defendant arranged for a marijuana sale between Paquette and a woman named Sherry from whom Paquette purchased 1/4 ounce and 1/8 ounce of marijuana for $45.00 (Tr. 94).

Detective Pusey testified that on both dates she drank two to three beers and that the alcohol she consumed had no effect on her ability to recall events (Tr. 146-47). She also testified that the reason that she and Paquette drank the beer was in order to fit into their surroundings (Tr. 148). In response to defense counsel's question as to whether they had purchased any drinks for defendant, Pusey stated that she could not remember, but that "sometimes we do that because they'll buy us a beer, we'll buy them a beer" (Tr. 149). Although Pusey could not specifically recall whether they had purchased any beer for defendant on January 3 and January 10, 1986, she conceded that it was "possible" (Tr. 150).

Defendant cites State v. Kourbelas, 680 P.2d 404 (Utah 1984), in support of his claim that since the officers first suggested purchasing drugs from defendant and since they had no reason to suspect that he had previously dealt drugs, he was entrapped by the officers' conduct. In Kourbelas, however, the undercover officer not only first suggested the purchase of marijuana but after two weeks had passed, he "renewed the contact and the request, which he followed up by calling the defendant at least five times in attempting to purchase the marijuana." Kourbelas 621 P.2d at 1240. As noted above, no such persistence or prodding was employed in the instant case.

Defendant's reliance on State v. Sprague, 680 P.2d 404 (Utah 1984) is also misplaced, for the same reasons stated above. In Sprague, repeated and persistent requests of the undercover officer were used in order to induce the defendant to sell marijuana. None such were employed in the instant case.

Another case upon which defendant relies is State v. Kaufman, 734 P.2d 465 (Utah 1987), a "sting" case in which an attractive undercover officer, representing herself to be a divorced woman supporting six children, sold items to the defendant at his jewelry store. The first three times she sold jewelry, she represented to the defendant that it was her own and was not stolen. Thereafter when the undercover officer set up a meeting with the defendant, defendant made overtones for a more intimate relationship. The defendant thereafter expressed reluctance about becoming implicated in illegal activity when the undercover officer openly broached the subject, and suggested

that the officer might be setting him up. At a later time he lamented that the officer had not visited him while he was in the hospital. He also offered to loan her some money on more than one occasion. The trial court concluded that the officer "was not just selling stolen merchandise, but was selling herself as an attractive, relatively young, divorced mother of six children who was having hard times." Kaufman, 734 P.2d at 468. The Utah Supreme Court affirmed the trial court's conclusion that under the objective standard set out in Taylor, the defendant was entrapped.

In the instant case there are no indications that the undercover officers were "selling themselves" in order to induce the defendant to commit the offenses. The record is devoid of any suggestion of romantic involvement or that close personal friendship were ever fostered or formed. In fact, the officers had a "cover story" to cut off any such intentions, and no dating or sexual advances of any kind occurred on either occasion (Tr. 57).

Defendant's attempt to equate the conduct of the officer in Kaufman with that of Paquette and Pusey in the instant case does not stand up to scrutiny. He alleges that the officers used similar tactics to "fit in" at the bowling alley, and to induce the defendant to obtain drugs for them (App. Br. 11). Yet in the instant case defendant arranged to sell and/or sold drugs to each undercover officer independently the first time he ever met them. He did so again a week later. On each occasion the officers only had to ask once. No high-pressure tactics were

employed, there was no pre-existing relationship between them, no appeals to friendship, sympathy, pity or the like, no offer of inordinate sums of money, in short, nothing but the fact that they were casual recent acquaintances who indicated a common interest in drugs. The fact that the officers may have first asked about the drugs does not make this a case of entrapment. It is well established that conduct that merely affords a person an opportunity to commit an offense does not constitute entrapment. Utah Code Ann. § 76-2-303(1); State v. Taylor, 599 P.2d 496 (Utah 1979).

It should also be noted that on January 3, 1986, Paquette's first contact with defendant was when Tony brought defendant over and introduced him to Paquette as his marijuana connection. This occurred just after Paquette asked Tony if he could get any marijuana, and Tony told her he could get some at the drop of a hat (Tr. 41). Thus there was no prior social interaction between Paquette and defendant. Defendant was brought in by Tony as part of a business transaction for the sale of marijuana. This is in contrast to the situation where an undercover officer attempts to first befriend a suspect and slowly works up over time to requesting illegal activity "for friendship's sake," or, for example, in order to alleviate some kind of hardship or suffering. See Taylor, supra, and Kaufman, supra.

Defendant asserts as part of his entrapment claim that "the officers were female and in all likelihood their sex assisted in making the acquaintance of defendant and others at

the bar" (App. Br. 10). The fact that the officers were female is of marginal relevance under the facts of the present case. His argument appears to be that whenever a suspect is involved in a drug deal with someone of the opposite sex, that suspect has been entrapped as a matter of law. It is an attempt to bootstrap the improper conduct of using one's sex and attractiveness to induce illegal conduct, such as that which occurred in Kaufman, supra, to the neutral conduct of the present case, where nothing of the sort occurred. Here, the defendant was not improperly induced to commit the offense, but was merely given an opportunity to do so.

Under all the facts and circumstances of the instant case, the officers' conduct, under the objective standard of entrapment, was a proper use of government power, and comported "with a fair and honorable administration of justice" Taylor, 599 P.2d at 500. Thus the evidence, when viewed in a light most favorable to the trial court's decision, does not as a matter of law leave a reasonable doubt that defendant was entrapped. State v. Udell, 728 P.2d 131, 133 (Utah 1986).

POINT III

THE PROSECUTOR LAID SUFFICIENT FOUNDATION AT TRIAL FOR ADMISSION OF THE DRUGS INTO EVIDENCE, AND THE COURT DID NOT ERR IN ADMITTING THE EXHIBITS.

Defendant contends that the marijuana and cocaine sold to the undercover officers on January 3, 1986 and January 10, 1986 were admitted into evidence without proper foundation. Specifically, he alleges a defect in chain of custody because David Murdock, the state crime lab criminologist who accepted

custody of all the exhibits from the police officer who obtained them from the police evidence locker, did not testify; nor did the criminologists who analyzed the exhibits testify that they obtained them directly from Murdock.

The governing legal standards applicable to a claim of insufficient foundation due to alleged defects in chain of custody were summarized by the Utah Supreme Court in State v. Bradshaw, 680 P.2d 1036 (Utah 1984):

> Before real evidence can be admitted, the trial court must be convinced that the proposed exhibit is in substantially the same condition when introduced into evidence as it was when the crime was committed. Where the evidence has passed through several hands, circumstances surrounding chain of possession are relevant in making this assessment. State v. Madsen, 28 Utah 2d 108, 498 P.2d 670 (1972); State v. Crook, 98 Idaho 383, 565 P.2d 576 (1977). See also 29 Am. Jur. 2d Evidence, § 774 at 846 (1967). However, the party proffering the exhibit is not required to eliminate every conceivable possibility that the evidence may have been altered. Baughman v. State, 265 Ark. 869, 582 S.W.2d 4 (1979); State v. McGinley, 18 Wash. App. 862, 573 P.2d 30 (1977); State v. Hodges, 109 Ariz. 196, 507 P.2d 121 (1973). Some jurisdictions have held that where no evidence has been offered to suggest tampering, proffered evidence is admissible if the chain of evidence is otherwise adequately established. Lebeau v. State, Wyo., 589 P.2d 1292 (1979); State v. Davis, 110 Ariz. 51, 514 P.2d 1239 (1973); Sparks v. State, 89 Nev. 84, 506 P.2d 1260 (1973). A weak link in the chain and any doubt created by it go to the weight to be given the evidence once the trial court has exercised the discretion to conclude that in reasonable probability the proffered evidence has not been changed in any important respect. State v. Vance, 240 Or. App. 283, 545 P.2d 604 (1976); Sorce v. State, 88 Nev. 350, 497 P.2d 902 (1972).

680 P.2d at 1039.

Since the handling of all four exhibits occurred in substantially the same way, and since defendant's allegation of defect in the chain of custody goes only to the link involving David Murdock as to each exhibit, a detailed examination of the handling of Exhibit 1 should suffice for purposes of tracing chain of custody, and in placing defendant's allegation in perspective. Exhibit 1 was the marijuana which Paquette obtained from defendant on January 3, 1986. The testimony at trial concerning Exhibit 1 may be summarized as follows:

Paquette received the baggie of marijuana from defendant (Tr. 83), after which she sealed and marked it, placed it into an envelope which she also marked and sealed, and then placed it into the night-deposit bin of the Salt Lake City evidence room (Tr. 84-85, 96). Paquette testified that once the item was dropped into the evidence bin, it could only be retrieved through the evidence custodian (Tr. 96-97). Paquette identified the envelope in court as bearing her handwriting showing the date and time, and identified the contents (baggie) as also bearing her handwriting showing her IBM number and date (Tr. 84). She identified the exhibit as being the 1/4 ounce of suspected marijuana which she purchased from defendant and Tony on January 3, 1986 (Tr. 84). Earl Price, a police officer assigned to Metro Narcotics charged with handling evidence in narcotics cases, received the exhibit from the evidence custodian of the evidence room in Salt Lake City on January 7, 1986 (Tr. 117 and 121). Price described the Salt Lake City Police Department evidence room as a locked, secured facility controlled

by an evidence custodian where evidence is held for purposes of later use in court (Tr. 117). Price further described the procedures for maintaining the security of evidence, including depositing and withdrawing items from the evidence room (Tr. 118-121). Price testified that when he received the exhibit from the evidence custodian, it was sealed and unopened (Tr. 121). He further identified markings on the exhibit which he had placed there showing the dates and times when he came into contact with it (Tr. 121). Price stated that he transported the exhibit from the evidence room in Salt Lake to the state toxicology laboratory to have it analyzed (Tr. 121). At that time he left it there, it was sealed and unopened (Tr. 121-22). Price gave the exhibit to David Murdock at the lab (Tr. 126). Murdock was employed at the State lab as a criminologist (Tr. 129). Terrance Weaver, another state lab analyst, testified and was qualified as an expert in the identification of controlled substances (Tr. 153). He identified the exhibit, stating that the envelope bore the laboratory case number, date of analysis and his initials (Tr. 155). He also identified the plastic baggie inside the envelope as having his seal on it with his initials, lab case number, and the date of which the contents were analyzed (Tr. 155). He testified that at the time he began his analysis, the envelope was sealed (Tr. 158). After completing the analysis, he placed the sample back into the plastic bag, put his seal on it, placed the plastic bag into the envelope, placed his seal on the envelope and placed the evidence into the evidence locker room at the lab (Tr. 158). Weaver further described the evidence room

facility at the state lab, which is a locked facility, and indicated that there were established laboratory procedures for depositing and retrieving evidence from the locker, and that he followed such procedures with respect to the exhibit (Tr. 159). Earl Price testified that on January 16, 1986, he retrieved the exhibit from Weaver at the state lab, transported it back to the evidence room and placed it into evidence (Tr. 122 and 127). Price also testified that as to all four exhibits, he followed established procedures set forth by his department for handling the exhibits (Tr. 125-26).

It is submitted that the above-described trial testimony constitutes convincing evidence that the proposed exhibit was in substantially the same condition when introduced into evidence as it was when the crime was committed. State v. Bradshaw, supra.

First, it is clear that the containers were the same ones initially received by the officers, in that in each case they bore the handwriting of the officers with other identifying information such as the date of each transaction (Tr. 84: Exh. 1; Tr. 95-96: Exh. 2; Tr. 88-89, 110-112, 133: Exh. 3; Tr. 93, 138: Exh. 4).

Thus the question becomes, since the same containers the orficer initially received had been individually marked by them and were identified by them in court, could the contents somehow have been switched or altered? In that respect it is noteworthy that, as indicated above as to Exhibit 1, all exhibits were sealed by the officers prior to being placed into evidence,

were sealed when Price withdrew them from the evidence room, were sealed when he left them at the lab, were sealed when the toxicologists, Weaver and Smith, started their analysis, and were resealed by them when their analysis was complete.

A claim of tampering seems particularly unlikely when it is recognized that, in the instant case, the officers not only marked and identified the containers in which they initially received the drugs (i.e. baggie, bindle), but also placed those containers into envelopes which they also marked and identified. Thus if David Murdock had for any reason unsealed the envelopes and thereatter inadvertently placed the wrong samples inside and then resealed them, the mistake would have been evident because the containers inside the envelopes would not have had the officers' markings on them.

Terrance Weaver testified that the State lab established procedures for the deposit and retrieval of evidence from the lab's evidence locker (Tr. 159). David Murdock was a criminologist at the state lab (Tr. 128-29). Earl Price followed standard procedures into delivering the exhibits into the custody of the state lab (Tr. 125-26). The toxicologists followed standard procedures in their contact with the exhibits (Tr. 159, 171-72). There is nothing in the record to suggest that the exhibits were altered or tampered with in any way. In order to imagine such a scenario one must supposed that between the time Murdock received the exhibits and the time they were placed in evidence at the lab, he or someone else unsealed the envelopes, removed the baggies or bindles therefore, unsealed those

containers as well, removed the substances which were originally inside the baggies or bindles, replaced them with new materials, sealed the containers back up, placed the containers back into the envelopes, and resealed the envelopes, all in such a manner as would show no signs of tampering.

As mentioned in Bradshaw, supra, the party proffering evidence is not required to eliminate every conceivable possibility that the evidence may have been altered. 680 P.2d at 1039.

In Utah, there is a presumption of regularity in the handling of evidence by police or other public officials. An exhibit will be excluded only if there is affirmative evidence of bad faith or actual tampering State v. Eagle Book, Inc., 583 P.2d 73, 75 (Utah 1978), citing United States v. Coades, 549 F.2d 1303, 1306 (9th Cir. 1977). Any gaps in the chain of custody go to the weight and not the admissibility of the exhibits State v. Eagle Book 538 P.2d at 75.

In State v. Bradshaw, 680 P.2d 1036 (Utah 1984), the Utah Supreme Court was confronted with a similar claim of defect in chain of custody. The defendant disputed the continuity of chain at the point where a sample of suspected marijuana was mailed to a state chemist for analysis. The Court rejected his claim, stating that mailing narcotics to a central laboratory does not necessarily constitute a break in the chain of custody. The Court also focused on the point that no evidence was presented to suggest that mailing the sample resulted in tampering or substitution of evidence. Bradshaw, 680 P.2d at

1039. Further, the Court stated that the fact that the sample remained overnight in a box ready for mailing in a locked office of a sheriff whose deputies also had access to the office went to the weight of the evidence. Bradshaw, 680 P.2d at 1039-40.

If mailing a sample of suspected narcotics to the lab does not necessarily constitute a break in the chain of custody, certainly hand-delivering a sample to a criminologist at the lab, as occurred in the instant case, should not be considered a break in the chain.

Furthermore, here, as in Bradshaw, no evidence was presented to suggest that the claimed defect in chain of custody resulted in tampering or substitution. Any claimed technical defect under the facts of this case would go to weight and not to admissibility.

Due to the fact that the prosecutor laid sufficient foundation that the proposed exhibits were in fact the drugs purchased by the undercover officers on January 3, 1986 and January 10, 1986, and that in reasonable probability the proffered evidence had not been changed or altered, the court did not abuse its discretion in admitting the exhibits into evidence.

CONCLUSION

Based upon the foregoing arguments, defendant's convictions should be affirmed.

DATED this 14th day of December, 1987.

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CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondent were mailed, postage prepaid, to J. Franklin Allred, and Margo L. James, attorneys for defendant, 321 South 600 East, Salt Lake City, Utah 84102, this 14th day of December, 1987.

CC Boston II